# Tan Sri Dr Muhammad Shafee Abdullah v Tommy Thomas & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-46–09 OF 2020(W)
ROHANA YUSUF PCA, VERNON ONG AND ABDUL RAHMAN SEBLI FCJJ
20 OCTOBER 2021

*Tort — Breach of statutory duty — Duties imposed by statute — Respondents proposed a motion to Malaysian Bar against appellant — Motion that appellant be condemned in the strongest terms for misconduct — Motion was filed under s 64(6) of the Legal Profession Act 1976 ('the LPA') and not under s 99(1) of the LPA — Appellant sued respondents premised on breach of statutory duty — Whether respondents in breach of statutory duty in filing motion under s 64(6) of the LPA — Whether motion proposed against appellant was a 'complaint' in substance within the meaning of s 99 of the LPA — Whether there was a breach of natural justice — Whether appellant entitled to remedy — Whether appellant's action had become academic on the ground that the motion was 'not tabled' at the AGM and that complaint of misconduct had been referred to disciplinary board — Legal Profession Act 1976 ss 64(6), 94 & 99*

The appellant had filed an action against the respondents premised on defamation, the tort of breach of statutory duty and conspiracy to defame ('the appellant's action'). The appellant's action arose from the publication and dissemination of the motion titled 'Motion against Shafee Abdullah' which was submitted by the first respondent and seconded by the second respondent, both members of the third respondent ('Malaysian Bar'), to the secretary of the Malaysian Bar. Subsequently, the Malaysian Bar and its then president ('the fourth respondent') published the motion on the Malaysian Bar website which was accessible to 15,000 members of the Malaysian Bar. The motion was scheduled to be tabled at the upcoming 69th Annual General Meeting ('AGM') of the Malaysian Bar on 14 March 2015. The appellant had also filed an application for interim injunction to restrain the tabling of the motion. The appellant's application for injunction was granted by the High Court. In respect of the appellant's action, the High Court and the Court of Appeal did not find in favour of the appellant, hence, the present appeal. In this appeal, the Federal Court had allowed the following questions of law to be pursued by the appellant: 1(a) in a specific matter pertaining to the allegation of breaches of discipline by an advocate and solicitor, can a member or members of the Malaysian Bar, having moved by way of a motion pursuant to s 64(6) of the Legal Profession Act 1976 ('the LPA') to resolve at the AGM that the Bar Council lodge a complaint against the advocate and solicitor to the disciplinary

board ('the DB') pursuant to, inter alia, s 94 read with s 99 of the same, simultaneously move for a resolution to, inter alia, condemn in the strongest terms the advocate & solicitor's same alleged breach of discipline at the same AGM; 1(b) in the above said circumstances, would not the rule of natural justice be offended, particularly when: (i) predetermination of the culpability of the advocate & solicitor's conduct was being sought for summary condemnation; and (ii) would not the subsequent disciplinary proceedings that was pursued against the advocate and solicitor be tainted with bias and prejudice as a result of the attempted predetermination of the culpability of the advocate and solicitor; 1(c) in the circumstances as in (a) and (b) above, would not the members proposing the motion through the Bar Council who, having received the proposed motion and published it to members at large for purposes of deliberating and possible carrying of the motion at the AGM be acting ultra vires the powers of the Bar Council and the Malaysian Bar in the face of s 94 read with s 99 of the LPA; 1(d) in the circumstances as in (a), (b) and (c) above, whether the Bar Council acting in breach of statutory duty by tabling the motion for the members deliberation rather than to simply refer the motion as a complaint to the DB; and 1(e) whether the motion proposed against the appellant, a 'complaint' in substance within the meaning of s 99 of the LPA. The present appeal was only concerned with the question of whether the respondents were liable in the tort of breach of statutory duty.

**Held**, allowing the appeal with no order as to costs, setting aside the decision of the Court of Appeal and allowing the appellant's action, and reverting the case to the High Court for assessment of damages against the third respondent by a High Court judge:

(1) The word 'complaint' was not defined in the LPA but that was because there was no mystery to the word. In the context of s 99(1) of the LPA, a more accurate definition of the word 'complaint' would be an allegation of misconduct. In truth the motion was a complaint of misconduct by an advocate and solicitor falling squarely within the purview of s 99(1) but dressed up as a motion under s 64(6) of the LPA. The fact that the complaint was made by way of motion under s 64(6) did not change the character of the complaint from being that of a complaint concerning the conduct of an advocate and solicitor within the meaning of s 99(1). It was the nature of the allegation and not the label or mode of filing that determined whether it was a complaint or otherwise, howsoever crafted. The first respondent and the second respondent, both very senior members of the Bar, should know that their motion, being a complaint concerning the conduct of an advocate and solicitor, would have to be referred to the DB for its action under s 99(1) and not to the Malaysian Bar for 'deliberation' under s 64(6) of the LPA. The court therefore answered question 1(e) in the affirmative (see paras 20–22, 30–31 & 79).

(2) Section 99(1) of the LPA was a special provision that dealt specifically with complaints of misconduct by advocates and solicitors whereas s 64(6) was a general provision that dealt generally with motions to be considered at the AGM. Applying the maxim *generalia specialibus non derogant*, s 64(6) being a general provision must give way to the special provision of s 99(1). From a plain reading of the provision, it was clear that Parliament's intention in enacting s 99(1) was to leave it entirely to the DB to deal with all matters concerning the conduct of advocates and solicitors or pupils. To allow any member of the Malaysian Bar to lodge a s 99(1) complaint by way of motion under s 64(6) was to render s 99(1) completely otiose and denuded of all meaning (see paras 40–41 & 43).

(3) The Court of Appeal held that the motion was nothing but a direction by members of the Malaysian Bar to lodge a complaint with the DB 'if and when the motion was carried'. In other words, the complaint would only be referred to the DB after the appellant had been condemned 'in the strongest words' at the AGM. With all due respect to the Court of Appeal, that would be to give a stamp of approval to the wrongful act of the Malaysian Bar in deciding on the appellant's guilt from the floor of the House without in the first place referring the complaint to the DB as required by s 99(1) of the LPA. That could not be the correct way to deal with a complaint under s 99(1) of the LPA. Based on the above findings, the court answered question 1(a) in the negative (see paras 32 & 79).

(4) In relation to question 1(b)(i), quite apart from the wrong procedure adopted by the first respondent and the second respondent in lodging the complaint of misconduct by the appellant, the Malaysian Bar committed a far more serious breach of the law when it published the motion on its website and tabling it for resolution at the AGM. This was not only illegal but grossly unfair and highly prejudicial to the appellant as it amounted to a prejudgment of his guilt ahead of the disciplinary proceedings before the DB. The court therefore answered question 1(b)(i) in the affirmative. The court answered question 1(b)(ii) in the negative because this was a matter which the appellant could take up should he be dissatisfied with the decision of the DB that was adverse to him (see paras 35 & 79).

(5) In respect of question 1(c) and question 1(d), s 99(1) of the LPA mandatorily required any complaint of misconduct by any advocate and solicitor to be made or referred 'in the first place' to the DB and this was in consonant with s 94 of the LPA which stated that for purposes of all disciplinary actions, all advocates and solicitors shall be subject to the control of the DB. However, this was not done in the present case. Instead of referring the complaint to the DB, the Malaysian Bar, in breach of s 99(1) of the LPA, uploaded the motion on their website and slated it to be tabled at the upcoming AGM. Being a statutory body and creature of the statute, the third respondent must act and conduct its

affairs within the framework of the LPA. Acts or conduct beyond its parameters would be ultra vires. The court therefore answered both question 1(c) and question 1(d) in the affirmative (see paras 18–19, 25–26 & 79).

(6) On a true construction of s 99(1) read with s 94(1) of the LPA, the appellant came within the class of persons intended to be protected by Parliament to have a private remedy. The LPA did not provide for a criminal penalty for non-compliance with the mandatory requirements of s 99(1) of the LPA. This would make a stronger case for civil liability to arise for its breach. The remedy was available as 'the remedy follows as an incident'. It was true that in the end the motion was not discussed due to the injunction obtained by the appellant, but the fact remained that the damage had been done. The allegation of misconduct in all its details had already been made, disseminated, and accepted by the Malaysian Bar for resolution at the upcoming 69th AGM, sending out a clear and unmistakeable message that the appellant had indeed been guilty of misconduct and must therefore be condemned 'in the strongest terms'. The court therefore rejected the Malaysian Bar's contention that no damage had been established by the appellant for the Malaysian Bar's breach of s 99(1) of the LPA (see paras 65, 67 & 70).

(7) The declaratory relief that the appellant sought for had a significant bearing on the disciplinary proceedings that he would be facing before the DB. The fact was the appellant would be facing the prospect of being disciplined by the DB with all the attendant consequences despite the gross violation of the law by the Malaysian Bar. Therefore, there was no merit in the respondents' contention that the appellant's action had become academic on the ground that the motion was 'not tabled' at the AGM and that the complaint of misconduct by the appellant had been referred to the DB. Given the circumstances, it was perfectly legitimate for the appellant to ask for a declaration that the Malaysian Bar had breached its statutory duty under s 99(1) of the LPA, thereby damnifying him and prejudicing his case before the DB (see paras 74–76).

**[Bahasa Malaysia summary**

Perayu telah memfailkan tindakan terhadap responden-responden berdasarkan fitnah, tort pelanggaran kewajipan statutori dan konspirasi untuk memfitnah ('tindakan perayu'). Tindakan perayu timbul daripada penyiaran dan penyebaran usul bertajuk 'Motion against Shafee Abdullah' yang dikemukakan oleh responden pertama dan disokong oleh responden kedua, kedua-duanya anggota responden ketiga ('Badan Peguam Malaysia), kepada setiausaha Badan Peguam Malaysia. Setelah itu, Badan Peguam Malaysia dan presidennya ketika itu ('responden keempat') menerbitkan usul tersebut di laman sesawang Badan Peguam Malaysia yang boleh diakses oleh 15,000 ahli Badan Peguam Malaysia. Usul tersebut telah dijadualkan untuk dibentang pada Mesyuarat Agung

Tahunan ('MAT') ke-69 Badan Peguam Malaysia yang akan datang pada 14 Mac 2015. Perayu juga telah memfailkan permohonan injunksi interim untuk menghalang pembentangan usul tersebut. Permohonan injunksi perayu telah dibenarkan oleh Mahkamah Tinggi. Berkenaan dengan tindakan perayu, keputusan Mahkamah Tinggi dan Mahkamah Rayuan tidak memihak kepada perayu, oleh itu, rayuan semasa. Dalam rayuan ini, Mahkamah Persekutuan telah membenarkan persoalan-persoalan undang-undang berikut dibicarakan oleh perayu: 1(a) dalam perkara khusus yang berkaitan dengan dakwaan pelanggaran tatatertib oleh peguambela dan peguamcara, bolehkah ahli atau ahli-ahli Badan Peguam Malaysia, setelah memulakan melalui usul menurut s 64(6) Akta Profesion Undang-Undang 1976 ('APUU') untuk memutuskan pada MAT bahawa Majlis Peguam membuat aduan kepada lembaga tatatertib ('LT') terhadap peguambela dan peguamcara menurut antara lain s 94 dibaca dengan s 99 yang sama, pada masa yang sama mengambil keputusan untuk, antara lain, mengutuk sekeras-kerasnya peguambela dan peguamcara yang didakwa melanggar disiplin di dalam MAT yang sama; 1(b) dalam keadaan yang tersebut di atas, tidakkah peraturan keadilan semula jadi akan dilanggar, terutamanya apabila: (i) penentuan awal salah laku peguambela dan peguamcara dimohon untuk kutukan ringkasan; dan (ii) tidakkah prosiding tatatertib berikutnya yang dijalankan terhadap peguambela dan peguamcara dicemari dengan berat sebelah dan prejudis akibat daripada percubaan penentuan awal salah laku peguambela dan peguamcara; 1(c) dalam keadaan seperti dalam (a) dan (b) di atas, bukankah ahli-ahli yang mencadangkan usul tersebut melalui Majlis Peguam yang, setelah menerima usul yang dicadangkan tersebut dan menerbitkannya kepada ahli-ahli secara amnya untuk tujuan perbincangan dan kemungkinan membawa usul tersebut pada MAT bertindak ultra vires kuasa Majlis Peguam dan Badan Peguam Malaysia yang termaktub di dalam s 94 dibaca bersama s 99 APUU; 1(d) dalam keadaan seperti dalam (a), (b) dan (c) di atas, sama ada Majlis Peguam bertindak melanggar kewajipan statutori dengan membentangkan usul untuk perbincangan ahli dan bukannya merujuk usul tersebut sebagai aduan kepada LT; dan 1(e) sama ada usul yang dicadangkan terhadap perayu adalah 'aduan' secara substansi dalam pengertian s 99 APUU. Rayuan semasa hanya berkenaan dengan persoalan sama ada responden bertanggungjawab dalam tort pelanggaran kewajipan statutori.

**Diputuskan**, membenarkan rayuan tanpa perintah berkenaan kos, mengenepikan keputusan Mahkamah Rayuan dan membenarkan tindakan perayu, mengembalikan kes kepada Mahkamah Tinggi bagi tujuan penilaian kerugian terhadap responden ketiga oleh seorang hakim Mahkamah Tinggi:

(1) Perkataan 'aduan' tidak ditakrifkan di dalam APUU kerana tiada misteri pada perkataan tersebut. Dalam konteks s 99(1) APUU, takrifan perkataan 'aduan' yang lebih tepat ialah dakwaan salah laku. Sebenarnya usul tersebut adalah aduan salah laku oleh peguambela dan peguamcara yang termasuk dalam bidang kuasa s 99(1) tetapi disamarkan sebagai usul

di bawah s 64(6) APUU. Hakikat bahawa aduan tersebut dibuat melalui usul di bawah s 64(6) tidak mengubah karakter aduan daripada aduan berkenaan salah laku peguambela dan peguamcara dalam pengertian s 99(1). Sifat dakwaan tersebut dan bukannya label atau cara pemfailan yang menentukan sama ada ianya adalah aduan atau sebaliknya, walau bagaimana ianya dibuat. Responden pertama dan responden kedua, kedua-duanya ahli kanan Badan Peguam, sepatutnya tahu bahawa usul mereka, yang merupakan aduan mengenai salah laku seorang peguambela dan peguamcara, perlu dirujuk kepada LT untuk tindakannya di bawah s 99(1) dan bukan kepada Badan Peguam Malaysia untuk 'pertimbangan' di bawah s 64(6) APUU. Oleh itu mahkamah menjawab soalan 1(e) secara afirmatif (lihat perenggan 20–22, 30–31 & 79).

(2) Seksyen 99(1) APUU ialah peruntukan khas yang menangani secara khusus aduan salah laku oleh peguambela dan peguamcara manakala s 64(6) ialah peruntukan am yang memperkatakan secara umum usul untuk dipertimbangkan pada MAT. Menggunakan maxim *generalia specialibus non derogant*, s 64(6) sebagai peruntukan am mesti memberi laluan kepada peruntukan khas s 99(1). Daripada pembacaan biasa peruntukan tersebut, adalah jelas bahawa hasrat Parlimen dalam menggubal s 99(1) adalah untuk menyerahkan sepenuhnya kepada LT untuk menangani semua perkara berkaitan salah laku peguambela dan peguamcara atau pelatih dalam kamar. Untuk membenarkan mana-mana ahli Badan Peguam Malaysia membuat aduan s 99(1) melalui usul di bawah s 64(6) adalah untuk menjadikan s 99(1) tidak berguna langsung dan kehilangan semua makna (lihat perenggan 40–41 & 43).

(3) Mahkamah Rayuan memutuskan bahawa usul tersebut tidak lain hanyalah arahan oleh anggota Badan Peguam Malaysia untuk membuat aduan kepada LT 'jika dan bila usul tersebut dijalankan'. Dalam erti kata lain, aduan hanya akan dirujuk kepada LT selepas perayu telah dikutuk 'dengan kata-kata yang paling keras' di MAT. Dengan segala hormatnya kepada Mahkamah Rayuan, tindakan tersebut seperti mengiktiraf tindakan salah Badan Peguam Malaysia dalam memutuskan kesalahan perayu dalam persidangan Badan Peguam Malaysia tanpa merujuk aduan tersebut kepada DB seperti yang dikehendaki oleh s 99(1) APUU. Itu bukanlah cara yang betul untuk menangani aduan di bawah s 99(1) APUU. Berdasarkan dapatan di atas, mahkamah menjawab soalan 1(a) secara negatif (lihat perenggan 32 & 79).

(4) Berhubung dengan soalan 1(b)(i), selain daripada prosedur yang salah yang diguna pakai oleh responden pertama dan responden kedua dalam membuat aduan salah laku oleh perayu, Badan Peguam Malaysia telah melakukan pelanggaran yang lebih serius terhadap undang-undang

apabila ia menerbitkan usul tersebut di laman sesawangnya dan membentangkannya untuk resolusi pada MAT. Ini bukan sahaja menyalahi undang-undang tetapi sangat tidak adil dan sangat prejudis kepada perayu kerana ia merupakan tindakan menghakimi kesalahan perayu sebelum prosiding tatatertib di hadapan LT. Oleh itu mahkamah menjawab soalan 1(b)(i) secara afirmatif. Mahkamah menjawab soalan 1(b)(ii) secara negatif kerana ini adalah perkara yang boleh dirayu oleh perayu sekiranya dia tidak berpuas hati dengan keputusan LT yang merugikannya (lihat perenggan 35 & 79).

(5) Berkenaan dengan soalan 1(c) dan soalan 1(d), s 99(1) APUU secara mandatori menghendaki apa-apa aduan mengenai kelakuan mana-mana peguambela dan peguamcara hendaklah 'pada mulanya' dibuat atau dirujukkan kepada LT dan ini adalah selaras dengan s 94 APUU yang menyatakan bahawa semua peguambela dan peguamcara adalah tertakluk bagi maksud semua tindakan tatatertib kepada kawalan LT. Walau bagaimanapun, ini tidak dilakukan dalam kes semasa. Bukan sahaja tidak merujuk aduan tersebut kepada LT, malahan Badan Peguam Malaysia dalam pelanggaran terhadap s 99(1) APUU, memuat naik usul tersebut di laman sesawangnya dan menjadualkannya untuk dibentangkan pada MAT yang akan datang. Sebagai badan berkanun dan badan yang diwujudkan di bawah akta, responden ketiga wajib bertindak dan menjalankan urusannya dalam rangka kerja APUU. Tindakan atau kelakuan di luar parameternya adalah ultra vires. Oleh itu mahkamah menjawab kedua-dua soalan 1(c) dan soalan 1(d) secara afirmatif (lihat perenggan 18–19, 25–26 & 79).

(6) Berdasarkan pentafsiran sebenar s 99(1) dibaca dengan s 94(1) APUU, perayu termasuk dalam kelas individu yang ingin dilindungi oleh Parlimen untuk mendapatkan remedi peribadi. Akta Profesion Undang-Undang 1976 tidak memperuntukkan hukuman jenayah di atas kegagalan mematuhi peruntukan mandatori s 99(1) APUU. Ini mengukuhkan lagi kes bahawa akan timbulnya tanggungjawab sivil di atas perlanggaran peruntukan tersebut. Remedi adalah tersedia kerana 'remedy follows as an incident'. Memang benar akhirnya usul tersebut tidak dibincangkan kerana injunksi yang diperolehi oleh perayu, tetapi hakikatnya kerosakan telah dilakukan. Dakwaan salah laku berserta semua butirannya telah pun dibuat, disebarkan, dan diterima oleh Badan Peguam Malaysia untuk diselesaikan pada MAT ke-69 yang akan datang, memberikan mesej yang jelas dan tidak boleh disangkal bahawa perayu sememangnya telah melakukan salah laku dan oleh itu mesti dikutuk dengan sekeras-kerasnya. Oleh itu mahkamah menolak dakwaan Badan Peguam Malaysia bahawa tiada kerosakan telah dibuktikan oleh perayu di atas pelanggaran oleh Badan Peguam Malaysia terhadap s 99(1) APUU (lihat perenggan 65, 67 & 70).

(7) Relif pengisytiharan yang dimohon oleh perayu mempunyai kaitan yang penting dengan prosiding tatatertib yang akan dihadapinya di hadapan LT. Hakikatnya perayu akan berhadapan dengan prospek untuk dikenakan tindakan disiplin oleh LT dengan semua akibatnya walaupun terdapat pelanggaran undang-undang yang teruk oleh Badan Peguam Malaysia. Oleh itu, tiada merit dalam dakwaan responden-responden bahawa tindakan perayu telah menjadi akademik atas alasan usul tersebut 'tidak dibentangkan' pada MAT dan aduan salah laku perayu telah dirujuk kepada LT. Berdasarkan keadaan tersebut, adalah sah untuk perayu memohon pengisytiharan bahawa Badan Peguam Malaysia telah melanggar kewajipan statutorinya di bawah s 99(1) APUU, dengan itu telah merugikan perayu dan memprejudiskan kes perayu di hadapan LT (lihat perenggan 74–76).]

**Cases referred to**

*Butler (or Black) v Fife Coal Co Ltd* [1912] AC 149; 1912 SC (HL) 33, HL (refd)
*Campbell v Gordon* [2016] UKSC 38, SC (refd)
*Cutler v Wandsworth Stadium Ltd* [1949] AC 398, HL (refd)
*Doe d Bishop of Rochester v Bridges* (1831) 1 B & Ad 847 (refd)
*Gibson v Union of Shop Distributive and Allied Workers* [1968] 2 All ER 252, Ch D (folld)
*Howard E Cashin, Re* [1989] 3 MLJ 129, HC (refd)
*Majlis Peguam Malaysia & Ors v Raja Segaran a/l Krishnan* [2005] 1 MLJ 15, CA (refd)
*Majlis Peguam v Cecil Wilbert Mohanaraj Abraham* [2019] 5 MLJ 159; [2019] 5 CLJ 139, FC (distd)
*Monk v Warbey and others* [1935] 1 KB 75, CA (refd)
*P Suppiah v The Law Society of Singapore* [1985] 1 MLJ 459; [1984–1985] 1 SLR 311, CA (folld)
*Pickering v Liverpool Daily Post and Echo Newspapers plc and others* [1991] 1 All ER 622, HL (refd)
*Tan Sri Dr Muhammad Shafee Abdullah v Tommy Thomas & Ors* [2017] 2 CLJ 453, HC (refd)
*Tan Sri Dr Muhammad Shafee Abdullah v Tommy Thomas & Ors* [2018] 12 MLJ 98; [2018] 10 CLJ 222, CA (refd)

**Legislation referred to**

Civil Law Act 1956 s 3(1)
Legal Profession Act 1976 ss 42, 42(1)(a), (1)(b), (1)(e), (1)(g), 64(6), 94, 94(1), 99, 99(1), 100, 103A, 103B, 103C, 103D, Part VII
Legal Profession Act [SG] s 86(1)

**Appeal from:** Civil Appeal No W-02(NCVC)(W)-1066–06 of 2016 (Court of Appeal, Putrajaya)

*Muhammad Shafee bin Abdullah (Muhammad Farhan bin Muhammad Shafee and Sarah Maalini Abishegam with him) (Shafee & Co) for the appellant.*
*Ambiga Sreenevasan (Michael Yap Chin Hong with her) (Tommy Thomas) for the first respondent.*
*Porres P Royan (Kumar Partnership) for the second respondent.*
*Lambert Rasa Ratnam (Andrew Chiew Ean Vooi and Nicola Tang Zhan Ying with him) (Lee Hishammuddin Allen & Gledhill) for the third and fourth respondents.*

**Abdul Rahman Sebli FCJ (delivering judgment of the court):**

THE QUESTIONS OF LAW

**[1]** This appeal concerns the procedure to be followed by the Malaysian Bar (third respondent) and its members in dealing with complaints of misconduct by fellow members. This court had allowed the following questions of law to be pursued by the appellant, who is an advocate and solicitor of the High Court of Malaya and a senior member of the Malaysian Bar:

Question 1(a)

In a specific matter pertaining to the allegation of breaches of discipline by an advocate and solicitor, can a member/s of the Bar, having moved by way of a motion pursuant to section 64(6) of the Legal Profession Act 1976 to resolve at the AGM that the Bar Council lodge a complaint against the advocate and solicitor to the Disciplinary Board pursuant to inter alia section 94 read with section 99 of the same, simultaneously move for a resolution to, inter alia, condemn in the strongest terms the advocate & solicitor's same alleged breach of discipline at the same AGM?

Question 1(b)

In the above said circumstances, would not the Rule of Natural Justice be offended, particularly when:

(i) predetermination of the culpability of the advocate & solicitor's conduct is being sought for summary condemnation?

(ii) Would not the subsequent disciplinary proceedings that is pursued against the advocate & solicitor be tainted with bias and prejudice as a result of the attempted predetermination of the culpability of the advocate & solicitor?

Question 1(c)

In the circumstances as in (a) & (b) above, would not the members proposing the motion through the Bar Council who, having received the proposed motion and published it to members at large for purposes of deliberating and possible carrying of the motion at the AGM be acting ultra vires the powers of the Bar Council and the Malaysian Bar in the face of section 94 read with section 99 of the LPA 1976?

Question 1(d)

In the circumstances as in (a), (b) and (c) above, is not the Bar Council acting in breach of statutory duty by tabling the motion for the members deliberation rather than to simply refer the motion as a complaint to the Disciplinary Board?

Question 1(e)

Is not the motion proposed against the Appellant dated 28.2.2015, a 'complaint' in substance within the meaning of section 99 of the LPA 1976?

## THE FACTUAL MATRIX

**[2]** The appellant's claim against the respondents arose from the publication and dissemination of the motion titled 'Motion against Shafee Abdullah' dated 28 February 2015 which was submitted by the first respondent and seconded by the second respondent, both members of the Malaysian Bar, to the Secretary of the Bar on 2 March 2015. For the most part of this judgment, we shall for convenience refer to the first and second respondents by name.

**[3]** On 9 March 2015, the Malaysian Bar and the fourth respondent, its then President, caused the motion in its entirety and with all its intended defamatory meaning, to be published on the Malaysian Bar website at http://www.malaysianbar.org.my titled 'Agenda and Motions for the 69th Annual General Meeting of the Malaysian Bar' which according to the appellant, and which the respondents did not dispute, was accessible to some 15,000 members of the Malaysian Bar. The motion was slated to be tabled at the upcoming 69th Annual General Meeting ('AGM') of the Bar scheduled to take place on 14 March 2015.

**[4]** The object of the motion was to condemn the appellant 'in the strongest terms' before lodging a complaint with the Disciplinary Board. This was admitted by Tommy Thomas in his evidence at the trial when he said:

> There is no doubt in our minds that they wanted the floor to condemn ... We thought that you cannot invite the Malaysian Bar to lodge a complaint unless you condemn first. We must be satisfied, in our mind, at a peer meeting.

**[5]** Clearly, the thinking was that the Malaysian Bar could only be 'invited' to lodge a complaint of misconduct by an advocate and solicitor with the Disciplinary Board after the advocate and solicitor had been condemned by fellow members at the AGM. Tommy Thomas also confirmed that the reason why the motion was presented and proposed to be debated at the AGM was because it involved 'a disciplinary matter'.

**[6]** At the time of the hearing of this appeal, the Disciplinary Board hearing against the appellant was ongoing, having been referred to the Board by the

A then incoming office bearers of the Bar Council pursuant to the motion submitted by Tommy Thomas and Tan Sri VC George. The complaint was in substance a replication of the motion moved by the two senior members of the Malaysian Bar dated 28 February 2015.

B **[7]** For purposes of this appeal, we do not propose to set out the details of the allegation of misconduct against the appellant. Suffice to say that they can be found in the judgment of the High Court in *Tan Sri Dr Muhammad Shafee Abdullah v Tommy Thomas & Ors* [2017] 2 CLJ 453 and in the judgment of the Court of Appeal in *Tan Sri Dr Muhammad Shafee Abdullah v Tommy Thomas & Ors* [2018] 12 MLJ 98; [2018] 10 CLJ 222.

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**[8]** The appellant received a copy of the motion by hand at his office on 11 March 2015. His response was to file a civil suit against the four respondents D on 12 March 2015 premised on defamation, the tort of breach of statutory duty and conspiracy to defame and seeking, inter alia, for the following declaratory orders:

(a) for a declaration that the said motion seeking the third and fourth defendants to condemn and reprimand the plaintiff is ultra vires the E Legal Profession Act 1976, in view that the said motion if adopted by the third and fourth defendants would usurp the very jurisdiction and powers of the Disciplinary Board of the third defendant under Part VII, in particular, ss 94, 99, 100, 103A, 103B, 103C and 103D of the Legal F Profession Act 1976;

(b) for a declaration that the said motion is ultra vires in view that, if it is adopted by the third and fourth defendants it would be a pre-determination on the alleged misconduct of the plaintiff and therefore placing any possible hearing before the Disciplinary Board of G the third defendant nugatory and prejudicial and unfair to the interest of the plaintiff; and

(c) for a declaration that the AGM of the third and fourth defendants is not a proper forum to hear the motion as the subject matter of the motion H substantively constitute a complaint against the plaintiff and thus should have been ordinarily brought to the attention of the Disciplinary Board of the third defendant by any interested member or members of the third and fourth defendants or any of the defendants.

I **[9]** At the same time the appellant moved the court ex parte for an interim injunction to restrain the tabling of the motion. His application for injunction was granted by the High Court on 13 March 2015, the day before the AGM was scheduled to be held. Had the injunction been refused, the appellant's fear was that he would have faced the risk of:

(a) the motion being passed;

(b) the lodging of a complaint against him on account of the motion being passed;

(c) facing the Disciplinary Committee and the Disciplinary Board constituting members who may have voted for the motion and having been exposed or appraised of matters prejudicial to him in the course of the debate on the motion; and

(d) the Disciplinary Committee and the Disciplinary Board, being so comprised and compromised, if they had found the appellant guilty, would have been a breach of natural justice and a denial of fair procedure.

**[10]** At the 69th AGM of the Malaysian Bar which proceeded as scheduled on 14 March 2015, the motion was raised and members of the Bar gave their views as to whether the motion should be discussed and put to a vote. It was decided that in view of the injunction obtained by the appellant, the motion would not be discussed. It is clear therefore that the decision by the Malaysian Bar not to discuss the motion moved by Tommy Thomas and Tan Sri VC George was purely because of the injunction obtained by the appellant and not because of any other reason, and certainly not because it wanted to refer the matter to the Disciplinary Board.

**[11]** To avoid any misapprehension of the issues involved, we need to mention that this appeal is only concerned with the question whether the respondents are liable in the tort of breach of statutory duty and not for the other two causes of action, namely defamation and conspiracy to defame. Nor is this appeal concerned with the question whether the appellant has or has not been guilty of misconduct.

SECTION 64(6) OF THE LPA

**[12]** The starting point is s 64(6) of the Legal Profession Act 1976 ('the LPA') which provides as follows:

> If any member desires to propose any motion to be considered at an annual general meeting convened under this section, he shall, not less than seven days before the date first appointed for holding the meeting, serve on the Secretary of the Malaysian Bar a notice of such motion in writing.

**[13]** It is a provision that prescribes the procedure to be followed by any member of the Malaysian Bar who desires to propose any motion to be considered at the AGM. The procedure is for the member to serve the notice of

motion in writing on the Secretary of the Bar not less than seven days before the date of the AGM. Only members of the Malaysian Bar are eligible to propose motions under this section.

**[14]** There is no dispute that the motion submitted by Tommy Thomas and Tan Sri VC George to the Bar Council was submitted pursuant to this provision of the LPA. The motion was captioned 'RE: MOTION FOR DELIBERATION AT BAR AGM ON 14TH MARCH 2015' and sought for the following resolutions:

> ACCORDINGLY, the Malaysian Bar hereby resolves to:-
>
> (i) Condemn, in the strongest terms, Shafee Abdullah's behavior since 10th February 2015;
>
> (ii) Call on the in-coming Bar Council to immediately lodge a complaint against Shafee Abdullah with the Disciplinary Board;
>
> (iii) To urge the Bar Council to take all other steps to prevent the appellant from continuing to bring the legal profession into disrepute.

SECTION 99(1) OF THE LPA

**[15]** Where, however, a member of the Malaysian Bar or any person wishes to lodge a complaint of misconduct by any advocate and solicitor or pupil, the LPA provides for a different procedure, which is the procedure prescribed by s 99(1) which reads:

> Any complaint concerning the conduct of any advocate and solicitor or of any pupil shall be in writing and *shall in the first place* be made or referred to the Disciplinary Board which shall deal with such complaint in accordance with such rules as may from time to time be made under the provisions of this Part. (Emphasis added.)

**[16]** The procedure is for the complaint to be in writing and made or referred first to the Disciplinary Board. It will thus be seen that the two provisions are different not only in terms of the procedure to be followed but also in terms of the subject matter they are dealing with. While s 64(6) deals with motions to be considered by members of the Bar at the AGM, s 99(1) deals with complaints of misconduct by advocates and solicitors or pupils by any person, members of the Bar included.

**[17]** In so far as the present appeal is concerned, s 99(1) is the substantive provision that calls to be considered in determining whether the respondents had acted lawfully in dealing with the complaint of misconduct by the appellant, and not s 64(6).

**[18]** There is no ambiguity in s 99(1). It provides in very clear language that

any complaint, meaning every complaint, concerning the conduct of any advocate and solicitor or of any pupil, must be made in writing and shall 'in the first place' be made or referred to the Disciplinary Board. It does not say that the complaint must first be made to or through the Malaysian Bar.

**[19]** This is consonant with s 94(1) of the LPA which provides that for purposes of all disciplinary actions, all advocates and solicitors shall be subject to the control of the Disciplinary Board, which means the power of discipline over advocates and solicitors rests with the Disciplinary Board and not with the Malaysian Bar or any other body. Historically, the power of discipline over advocates and solicitors was at one time vested in the Malaysian Bar but with the amendment to the LPA in 1992 vide Amending Act A812 which saw the establishment of the Disciplinary Board, the Malaysian Bar has been divested of such power since 1 April 1992. There is only a remote possibility that the Bar Council is not aware of this amendment to the LPA.

WHETHER MOTION A 'COMPLAINT'

**[20]** By any reckoning, Tommy Thomas and Tan Sri VC George, both very senior members of the Bar, should know that their motion, being a complaint concerning the conduct of an advocate and solicitor, would have to be referred to the Disciplinary Board for its action under s 99(1) and not to the Malaysian Bar for 'deliberation' under s 64(6). Did the two senior lawyers know that their motion was a 'complaint concerning the conduct of any advocate and solicitor' within the meaning of s 99(1) of the LPA? It will be naïve to think that they did not.

**[21]** The word 'complaint' is not defined in the LPA but that is because there is no mystery to the word. It must be given its ordinary and popular meaning. The *Concise Oxford English Dictionary* (11th Ed, Revised) defines it to mean: 'an act or the action of complaining. A reason for dissatisfaction'. There is of course a technical and legal meaning given to the word by *Black's Law Dictionary* (Deluxe 9th Ed) which defines it as: '1. The initial pleading that starts a civil action and states the basis for the court's jurisdiction, the basis for the plaintiff's claim, and the demand for relief', but having regard to the legislative scheme of s 99(1), to apply that meaning to the word 'complaint' in the provision would in our view be absurd.

**[22]** In the context of s 99(1), a more accurate definition would be an allegation of misconduct: see also *Re Howard E Cashin* [1989] 3 MLJ 129, where a complaint is defined as an accusation of misconduct. In *Majlis Peguam v Cecil Wilbert Mohanaraj Abraham* [2019] 5 MLJ 159; [2019] 5 CLJ 139 ('Cecil Abraham') this court made the following pertinent observations:

A [29] In interpreting or construing any document, as in the letter of complaint in this case, to obtain the intent and purpose of the same, courts must read that document in its entirety. That is trite law. Taking that approach, we have no hesitation in concluding that the letter of complaint was in fact a complaint meeting the requirement of s 99(1) of the LPA and our reasons are these.

B [30] Firstly, one must not lose sight of the fact that complaints made under the LPA are mostly made by lay people and if one is to take a strict and narrow approach in determining whether a letter written by someone not well versed to legalism would in our view defeat the purpose of the LPA which undoubtedly is a piece of legislation aimed to ensure complainants' access to justice is not unduly hampered.

C [31] Secondly, we must give some meaning to the heading of letter of complaint which simply reads 'COMPLAINT'. It also begs the question — 'why should the complainant write to the DC in the first place?'. The answer surely is that the only intent is to make a complaint relating to the alleged misconduct of the respondent. As to how the complaint is framed, they should not be construed in a manner which D may make one's constitutional right to access to justice erroneous. Hence with respect there was no necessity to seek solace in the *Oxford Dictionary* to determine what the word 'complaint' means in the context of the LPA.

E **[23]** The Court of Appeal did not consider the motion submitted by Tommy Thomas and Tan Sri VC George to the Malaysian Bar to be a 'complaint' within the meaning of s 99(1). It considered the motion to be a mere 'proposal'. David Wong Dak Wah CJ (Sabah and Sarawak) who chaired the panel and who wrote the judgment of the court dealt with the matter in this manner:

F With respect, reading the motion in the most liberal manner, we cannot find that it amounts to a complaint. It is nothing but a proposal as in all motions for something to be done. In this case, it is nothing but a direction from the members to the governing body to lodge a complaint with the Disciplinary Board if and when the motion is carried. To read anything more to that is overstretching the plain meaning of the words contained in the motion. There is no attempt by the respondents to G usurp the statutory duties of the disciplinary committee and the Disciplinary Board.

**[24]** Earlier, the High Court in dismissing the appellant's claim after a full trial of the action had expressed its views as follows:

H [152] I am persuaded by the defendant's contention that the fact that the motion calls upon in-coming Bar Council to lodge a complaint against the plaintiff with the Disciplinary Board shows clearly that the AGM is not the disciplinary authority and the disciplinary process does not take place at the AGM. The disciplinary proceeding process as enunciated by the Act would only commence upon the I lodgment of that complaint by the Disciplinary Board.

[153] It must be stressed that the evidence clearly shows that the third and the fourth defendants (Bar Council) were receiving the motion pursuant to s 64(6) of the LPA which stipulates that any motion to be considered at the AGM of the Malaysian Bar shall be served on the secretary of the Malaysian Bar.

[154] In my view, the motion concerns the conduct of an advocate and solicitor is different from suggesting that the motion is meant to discipline the plaintiff.

[155] I agree with the defendant's submission that had the motion been presented, debated and passed at the 69th AGM, it would not have resulted in any sanction against the plaintiff for 'misconduct' under s 94 of the LPA. All that would have occurred, was the Bar Council proceeding to lodge a complaint against the plaintiff, thereby commencing the disciplinary process under Part VII of the LPA.

[156] Further, if the motion sought to 'convict' and usurp the disciplinary powers of the Disciplinary Board, it would have been wholly unnecessary for the motion to call upon the in-coming Bar Council to immediately lodge a complaint against the plaintiff.

**[25]** Both courts below were right of course in taking the view that the Malaysian Bar is not the disciplinary authority and that there was no attempt by the body to usurp the power of the Disciplinary Board by taking disciplinary action against the appellant, but the point missed was that s 99(1) of the LPA mandatorily requires any complaint of misconduct by any advocate and solicitor to be made or referred 'in the first place' to the Disciplinary Board, which was not done in this case. Instead of referring the complaint to the Disciplinary Board after receiving the motion from Tommy Thomas and Tan Sri VC George, the Malaysian Bar, in breach of s 99(1), uploaded it on the Bar's website and slated it to be tabled at the upcoming 69th AGM on 14 March 2015.

**[26]** Being a statutory body and creature of statute, the Malaysian Bar must act and conduct its affairs within the framework of the LPA. Acts or conduct beyond its parameters would be ultra vires: see the decision of the Court of Appeal in *Majlis Peguam Malaysia & Ors v Raja Segaran a/l Krishnan* [2005] 1 MLJ 15 which states the position of the law correctly.

**[27]** We were not referred to any local authority directly on point on the working of s 99(1) of the LPA. The decision of this court in *Cecil Abraham* is of little assistance as the complaint of misconduct by the advocate and solicitor in that case was made directly to the Disciplinary Board, which was in accordance with s 99(1). Furthermore, the issue in that case was whether the letter of complaint amounted to a complaint as envisaged by the LPA. It did not deal with the question whether it is mandatory for a complaint under s 99(1) to be referred first to the Disciplinary Board.

**[28]** The decision of the Singapore Court of Appeal in *P Suppiah v The Law Society of Singapore* [1985] 1 MLJ 459; [1984–1985] 1 SLR 311, which deals with the old s 86(1) of the Singapore Legal Profession Act ('the SLPA'), is instructive. In that case it was held that it was mandatory for the Law Society of Singapore (the Council) to make the application or complaint of

misconduct by an advocate and solicitor in his professional capacity to the Inquiry Committee 'in the first place' on receipt of the application or complaint under s 86(1) of the SLPA. Section 86(1) of the SLPA as it stood then reads as follows:

> 86(1) Any application by any person that an advocate and solicitor be dealt under this Part and any complaint of the conduct of an advocate and solicitor in his professional capacity shall in the first place be made to the Society and the Council shall refer the application or complaint to the Inquiry Committee.

**[29]** In the present case, nowhere in their judgments did the High Court and the Court of Appeal make any reference to s 99(1) of the LPA although it can readily be inferred from the judgment of the Court of Appeal that it had the provision in mind when it made the following observations at para [91]:

> [91] From what we can understand from the appellant, his complaint is that the motion put forth was not done according to what is prescribed by the LPA. What is required by the LPA is for the first and second respondents to merely lodge a complaint with the Disciplinary Board which shall then deal with the complaint as it deems fit in accordance with what is prescribed by the LPA. The manner in which the motion is couched, it is submitted by the appellant, shows that it is nothing but a blatant attempt to find him guilty of misconduct through the AGM, in effect bypassing the process of hearing by the disciplinary committee and the Disciplinary Board which are mandated by the LPA to deal with misconduct of members of the Malaysian Bar. Hence both the first and second respondents had committed a statutory breach.

**[30]** The High Court and the Court of Appeal would be right in their views if the motion submitted by Tommy Thomas and Tan Sri VC George was a motion that comes within the ambit of s 64(6) of the LPA and outside the purview of s 99(1) but it was not. In truth it was a complaint of misconduct by an advocate and solicitor falling squarely within the purview of s 99(1) but dressed up as a motion under s 64(6).

**[31]** The fact that the complaint was made by way of motion under s 64(6) does not change the character of the complaint from being that of a complaint concerning the conduct of an advocate and solicitor within the meaning of s 99(1). It is the nature of the allegation and not the label or mode of filing that determines whether it is a complaint or otherwise, howsoever crafted.

**[32]** The Court of Appeal had gone on to hold that the motion was nothing but a direction by members of the Malaysian Bar to lodge a complaint with the Disciplinary Board 'if and when the motion was carried'. In other words, the complaint would only be referred to the Disciplinary Board after the appellant had been condemned 'in the strongest words' at the AGM. With all due respect to the Court of Appeal, that would be to give a stamp of approval to the

wrongful act of the Malaysian Bar in deciding on the appellant's guilt from the floor of the House without in the first place referring the complaint to the Disciplinary Board as required by s 99(1) of the LPA. That cannot be the correct way to deal with a complaint under s 99(1).

**[33]** It was the same view held by Tommy Thomas and Tan Sri VC George at the time they submitted the motion to the Malaysian Bar. As admitted by Tommy Thomas himself at the trial, what they wanted was for the appellant to be condemned 'at a peer meeting' before the guilty 'verdict' was referred to the Disciplinary Board. The nature of the motion speaks for itself condemn first, complain later.

**[34]** Even if it was proper for the Malaysian Bar to have accepted the motion submitted by Tommy Thomas and Tan Sri VC George, the right thing for the Bar to do would have been to refer the complaint to the Disciplinary Board as required by s 99(1), as it should have been plain and obvious to the Bar that the motion was a complaint of misconduct by an advocate and solicitor, which the Malaysian Bar had no jurisdiction to deal with.

PREJUDICE TO THE APPELLANT

**[35]** Quite apart from the wrong procedure adopted by Tommy Thomas and Tan Sri VC George in lodging the complaint of misconduct by the appellant, the Malaysian Bar committed a far more serious breach of the law when it published the motion on its website and tabling it for resolution at the AGM. This is not only illegal but grossly unfair and highly prejudicial to the appellant as it amounts to a prejudgment of his guilt ahead of the disciplinary proceedings before the Disciplinary Board.

**[36]** The fact that the motion was not discussed at the AGM due to the injunction obtained by the appellant does not make it any less wrongful for the Malaysian Bar to have done what it did. By the time the appellant obtained the interim injunction, the allegation of misconduct against him had already been disseminated to the 15,000 or so members of the Bar. It had also attracted wide media coverage, due in no small measure to the motion by Tommy Thomas and Tan Sri VC George to condemn the appellant 'in the strongest terms' at the upcoming 69th AGM of the Malaysian Bar on 14 March 2015.

**[37]** It was argued by Dato' Ambiga Sreenevasan that the appellant had himself to blame for the publicity surrounding the complaint lodged by Tommy Thomas and Tan Sri VC George as it was he himself who put the spotlight on his behavior and conduct since the decision of the Federal Court in Sodomy II Appeal involving Dato' Seri Anwar Ibrahim by, inter alia, participating in a nationwide roadshow to condemn a convicted prisoner, and

to disclose *in camera* evidence to members of the public.

**[38]** That may be so, but it does not in any way put right the wrong that the Malaysian Bar committed by contravening s 99(1) of the LPA. Had it not been for the injunction obtained by the appellant, the motion would have been discussed openly at the AGM, unlike proceedings before the Disciplinary Board which would be conducted behind closed doors.

**[39]** Dato' Ambiga Sreenevasan however pointed out that the proceedings before the Malaysian Bar to discuss the complaint of misconduct by the appellant would also have been conducted behind closed doors, suggesting of course that it would be no different from proceedings before the Disciplinary Board. With due respect, the difference is that the proceedings before the Malaysian Bar would be illegal whereas the proceedings before the Disciplinary Board would be sanctioned by law.

SECTION 64(6) VIS A VIS S 99(1)

**[40]** It needs to be emphasised that s 99(1) of the LPA is a special provision that deals specifically with complaints of misconduct by advocates and solicitors whereas s 64(6) is a general provision that deals generally with motions to be considered at the AGM. Applying the maxim *generalia specialibus non derogant*, s 64(6) being a general provision must give way to the special provision of s 99(1). Like any other legislation passed by Parliament, s 99(1) must be given a construction that will give effect to its object rather than to defeat it.

**[41]** From a plain reading of the provision, it is clear that Parliament's intention in enacting s 99(1) was to leave it entirely to the Disciplinary Board to deal with all matters concerning the conduct of advocates and solicitors or pupils, hence the direction in imperative terms that the complaint 'shall' in the first place be made or referred to the Disciplinary Board. This is to ensure that the disciplinary process is not contaminated by any premature finding of guilt in whatever form by any other body before the complaint is brought before the Disciplinary Board. There is nothing in the LPA that gives the Malaysian Bar the right to place before the floor of the AGM any complaint concerning the conduct of an advocate and solicitor by way of a motion under s 64(6). In fact it points in the opposite direction.

**[42]** It is trite law that where an Act creates an obligation and enforces the performance in a specified manner, it must be taken as a general rule that performance cannot be enforced in any other manner: see *Doe d Bishop of Rochester v Bridges* (1831) 1 B & Ad 847 per Lord Tenterden CJ. What Tommy Thomas and Tan Sri VC George did in the present case was to sidestep the

mandatory requirement of s 99(1) of the LPA, in the process undermining the Bar's own law that requires every complaint concerning any misconduct by any advocate and solicitor to be made or referred first to the Disciplinary Board. This blatant disregard for the law by very senior members of the Bar is hard to understand.

**[43]** To allow any member of the Malaysian Bar to lodge a s 99(1) complaint by way of motion under s 64(6) is to render s 99(1) completely otiose and denuded of all meaning, for then any complaint concerning the conduct of an advocate and solicitor could just be made to the Malaysian Bar by way of a motion under s 64(6) and to be summarily resolved on the floor of the House without first referring it to the Disciplinary Board as required by s 99(1). That will be to defeat the object behind s 99(1) of the LPA.

**[44]** It is true that the Malaysian Bar has no power to 'convict' any advocate and solicitor of any disciplinary offence as correctly pointed out by the learned High Court judge but it is precisely for this reason that it should not in the first place involve itself with any matter concerning the conduct of advocates and solicitors. Clearly, the AGM is not the right forum to pass judgment on the conduct of any advocate and solicitor, even if it is only to condemn the advocate and solicitor 'in the strongest terms'. This is not something that this court will countenance as it is a clear contravention of the law by, of all bodies, the guardian of the LPA itself.

**[45]** The argument must not be stretched too far, as did the High Court, by saying that since the Malaysian Bar is not the disciplinary authority and that the disciplinary process does not take place at the AGM, it then becomes lawful for the Bar to discuss and to pass resolutions at the AGM on any complaint concerning the conduct of an advocate and solicitor by way of a motion under s 64(6) of the LPA.

**[46]** When the law entrusts a particular body to deal with a particular matter, that matter must be left to that body to deal with. In the context of the present case, the body that the law entrusts to deal with all matters concerning the conduct of advocates and solicitors is the Disciplinary Board and not the Malaysian Bar.

SECTION 42 OF THE LPA

**[47]** Dato' Ambiga Sreenevasan submitted that the motion submitted by Tommy Thomas and Tan Sri VC George is not ultra vires the LPA because it is consistent with the objects of the Malaysian Bar as provided in s 42 of the LPA, namely:

(a) to uphold the cause of justice without regard to its own interests or that

of its members, uninfluenced by fear or favour, pursuant to sub-s (1)(a);

(b) to maintain and improve the standards of conduct of the legal profession in Malaysia, pursuant to sub-s (1)(b);

(c) to promote in any proper manner the interests of the legal profession in Malaysia, pursuant to sub-s (1)(e); and

(d) to protect and assist the public in all matters touching ancillary or incidental to the law, pursuant to sub-s (1)(g).

**[48]** With due respect, the argument is seriously flawed as it ignores the need for the Malaysian Bar, in pursuing those noble objectives, to abide by its own rule on the procedure to be followed in dealing with complaints of misconduct by its members, in this case the procedure prescribed by s 99(1) of the LPA.

**[49]** With s 99(1) in place, the Malaysian Bar has no business as a matter of fact and law to deal with any complaint of misconduct by any advocate and solicitor, either by way of motion under s 64(6) or by any other way. This function has been reposed in the Disciplinary Board by statute, which function is to be exercised by the Board 'in accordance with such rules as may from time to time be made under the provisions of this Part'. Obviously the Malaysian Bar is not bound by these rules and this works to the detriment of the advocate and solicitor who has the misfortune of being hauled up before the Bar by way of motion under s 64(6) where his peers will be free to condemn him 'in the strongest terms' from the floor of the House.

**[50]** Section 99(1) of the LPA must be construed strictly and narrowly as any step taken to commence disciplinary proceedings against an advocate and solicitor has the potential to ruin his reputation and livelihood. What is clear is that the Malaysian Bar had violated s 99(1) by failing to refer the complaint of misconduct by the appellant to the Disciplinary Board after receiving the motion submitted by Tommy Thomas and Tan Sri VC George. It is in this light that the following observation by the Court of Appeal at para [82] of the judgment must be understood:

> [82] The motion in substance relates to the conduct of the appellant in the context of breach of etiquette and publicity rules of the LPA. As the guardian of the LPA, the Malaysian Bar is legally bound to receive the motion. Hence the 'interest test' is complied with.

**[51]** The point to make here is that it was wrong for the Court of Appeal to hold that the Malaysian Bar as 'guardian of the LPA' is legally bound to receive any motion submitted to it under s 64(6) of the LPA, meaning to say the Bar has no choice but to accept any and every motion it receives from its members. But surely the Malaysian Bar is not legally bound to accept a motion that

defames others, or is vulgar, or has a seditious tendency or which relates to a matter which is *sub judice*. The AGM of the Malaysian Bar is not the proper forum for the discourse of such matters. As such it is, in our view, incumbent on the Bar Council to scrutinise the contents of a motion submitted by any member.

**[52]** Even if the Malaysian Bar was legally bound to receive the motion submitted by Tommy Thomas and Tan Sri VC George as opined by the Court of Appeal, it was still bound by s 99(1) to refer the complaint to the Disciplinary Board, notwithstanding the fact that it was served by way of a motion under s 64(6) of the LPA and not by way of a complaint under s 99(1). Section 99(1) clearly applied as the motion was for all intents and purposes a complaint concerning the conduct of the appellant as an advocate and solicitor.

**[53]** At the trial of the action, Tan Sri VC George, a former judge of the Court of Appeal, readily admitted that s 99(1) is the specific statutory provision to adopt should there be a complaint of misconduct by the appellant. He however denied any wrongdoing by saying that he was not the person who wanted to prosecute the appellant should the complaint be made to the Disciplinary Board, implying perhaps that it was not his personal wish that the appellant should be found guilty of misconduct.

**[54]** Among the reasons that Tan Sri VC George gave for not lodging the complaint himself was that he was not the aggrieved party as the appellant did not steal his money. The following exchanges between counsel for the appellant ('KH') and Tan Sri VC George ('VC') during cross-examination provides some insight into what went on inside Tan Sri VC George's mind when he decided to second the motion by Tommy Thomas:

> KH: And I would go on from there to say, I have to put it to you that given the specific statutory mechanism provided, the misconduct of Tan Sri Shafee cannot be brought before the AGM, the Malaysian Bar because that would effectively be the discussion of a misconduct of an advocate and solicitor outside the parameters of the statutory mechanism with all its attendance preservation of the rights of the advocate concerned. So I am making that proposition. Tan Sri, do you agree with that proposition?
>
> VC: My answer to that proposition is there is the provision for report to be made to the Disciplinary Board. I could have made a complaint to the Disciplinary Board. Then I would be expected to prosecute that complaint. I was not prepared to do that. I was not the aggrieved party in that sense. As I said earlier, Shafee hasn't stolen my money or committed some breach of confidence in the solicitors and clients relation or some such thing, his conduct was a matter for the, of concern to the whole Bar. I was aware that the Bar Council themselves could be the complainant in this section 99 that you referred to suggested that I can complain.
>
> KH: Of course.

VC: Because of the provision of the Legal Profession Act, the Bar Council itself could be a complainant.

KH: Yes.

VC: So my, what I wanted done was to persuade the bar to invoke section 99, for Bar Council to invoke section 99 and be a complainant. They can prosecute the thing. I didn't have to prosecute the thing.

**[55]** Tan Sri VC George was also asked in cross-examination what his view was on the first resolution sought by him and Tommy Thomas, which was to condemn the appellant in the strongest terms. His answer was that they were of the opinion that the appellant had already breached the rules and they were trying to persuade the Malaysian Bar to accept their opinion as fact. By this answer, it is clear that their concern was more with making sure that the appellant was found guilty of misconduct by way of resolution at the AGM than to refer the complaint to the Disciplinary Board first as required by s 99(1) of the LPA. Viewed from this perspective, the appellant may well be justified in arguing that Tommy Thomas and Tan Sri VC George were directly involved in causing the Malaysian Bar to breach s 99(1) of the LPA.

**[56]** Ironically, despite their convictions that the appellant was guilty of misconduct, both Tommy Thomas and Tan Sri VC George were not willing to prosecute the complaint as complainants themselves. They would rather have the whole floor of the AGM condemn the appellant in the strongest terms, a punishment by itself. Tan Sri VC George somehow contradicted himself when he said that he would not have supported the motion and even dissuaded Tommy Thomas from submitting it as what he wanted was for somebody to lodge a complaint against the appellant.

**[57]** This is a very interesting revelation as it shows that other than himself and Tommy Thomas, no one else had in fact wanted to lodge any complaint of misconduct by the appellant. What is more pertinent in the whole scheme of things is that there is no evidence that the target of the appellant's alleged misconduct himself, namely Dato' Seri Anwar Ibrahim, had expressed any intention to lodge any complaint of misconduct against the appellant.

**[58]** Tan Sri VC George was right when he said that both he himself and the Malaysian Bar could 'prosecute the thing'. That being so, and given the requirement of the law that a complaint concerning the conduct of an advocate and solicitor must first be made or referred to the Disciplinary Board, and given the fact that he and Tommy Thomas had wrongfully submitted the motion for 'deliberation' at the AGM, the least they could have done to undo their wrongful act was to withdraw the motion and to advise the Malaysian Bar to file a fresh complaint, this time under s 99(1) of the LPA. But there is no evidence that they took any such step. On the contrary, their own evidence

shows that they were bent on making sure that the appellant was found guilty of misconduct on the floor of the House before referring the complaint to the Disciplinary Board. Had it not been for the injunction obtained by the appellant which stifled their intention, the motion would have proceeded for discussion and resolution at the AGM.

INCONSISTENT STAND OF THE BAR

**[59]** To her credit, learned counsel for Tommy Thomas, Dato' Ambiga Sreenevasan, herself a former President of the Malaysian Bar, is on record having warned the Malaysian Bar at a different AGM involving a different advocate and solicitor that the Bar would be setting a 'terrible precedent' if a complaint concerning the conduct of an advocate and solicitor were to be brought by way of motion and asking the floor to refer the advocate and solicitor to the Disciplinary Board. Precisely what the Malaysian Bar did in the present case. This can be seen from the following minutes of the 67th AGM of the Malaysian Bar published in the extracts of minutes of the 68th AGM of the Bar, where at p 2523 of the record of appeal she is recorded to have strongly opposed the wrong procedure adopted by the Bar in that particular instance:

> Disciplinary proceedings are not decided from the floor, and never have been. It is for BC to take that position. Ambiga asked whether the House will be setting a terrible precedent, namely that from now onwards, for all cases, whether somebody makes a complaint against a lawyer, a motion is brought to the floor asking that a complaint be referred against that lawyer to the ASDB. She urged Members to have the wisdom to do the right thing, by leaving the matter to the BC to decide.

**[60]** At p 2525 of the record of appeal, the President of the Bar had explained the correct position when he said:

> It is merely the complainant that will carry the carriage of the complaint.

**[61]** The following minutes of the same AGM provide further and irrefutable evidence that the Malaysian Bar knew exactly what the correct procedure was in dealing with any complaint of misconduct by any advocate and solicitor:

> Page 2527 of the appeal record:
>
> Ragunath Kesavan of the KL Bar agreed with the concern expressed by Ambiga Sreenevasan, that, in respect of issues concerning disciplinary proceedings, a bad precedent will be set if the House were to direct BC to take action in this matter. That means in future, all disciplinary matters will come to the House for discussion, and resolutions passed directing BC to comply with the House's wishes by lodging complaints. The LPA states clearly that BC is the body to decide whether to take disciplinary action against any Member of the Bar, based on the facts of the matter. Should BC fail to take any action in the present instance, the House can hound BC. Ragunath Kesavan referred to the pertinent point raised by Jeyakumar

Palakrishnan, that since Americk Singh Sidhu could lodge a complaint independently regardless of what BC does or does not do.

Page 2527 of the appeal record:

The Chairman said that based on Ragunath Kesavan's statement, the House cannot direct BC to lodge a complaint but should leave it to the BC to make a decision. Any Member of the Bar who wishes to lodge a complaint is at liberty to do so. The House has to reserve the right of BC to decide.

Page 2528 of the appeal record:

DP Vijandran asked if BC's decision will be changed by what is happening at the AGM. If the answer is yes, then it is no longer a decision of BC. The decision will become invalid. When the matter goes to ASDB, it will be debated by very senior lawyers representing the two parties and they will look for flaws such as this. DP Vijandran asked the House to let BC do what it is meant to and finish the job. Just as Ambiga Sreenevasan and Sulaiman Abdullah have said, the process for Members who are not happy with what BC has done in respect of the matter, is to bring the motion of no confidence to the AGM on that score. Let BC do its job and the Bar will be venerated by the public as a body that acts responsibly.

Page 2528 of the appeal record:

Vivekananda s/o AMS Periasamy of the Perak Bar said that it is very clear from the statements by DP Vijandran and Ambiga Sreenevasan that BC has a role to play and that it is bound by the LPA. The House is looking at a motion that seeks to give total direction to BC on what to do, and will open a huge floodgate. Once the precedent is set, there will be repercussions. In the future, BC will be told what to do by the House. It is not that BC has not done anything in this matter.

Page 2529 of the appeal record:

Razlan Hadri of the KL Bar noted that the questions posed in this debate are not new. He recalled that years ago, a motion had been brought to the AGM asking the Malaysian Bar to elect the late Raja Aziz Addruce to be the President of the Malaysian Bar on the basis that he had obtained the highest votes in the election. Basically the motion directed BC to comply with the wishes of the floor. As previous eminent speakers have pointed out, this type of motion takes away BC's discretion to decide. It cannot be done. No matter how emotionally involved Members are about the issue at hand, the House cannot direct BC to do whatever it wishes. Members elect BC and should leave BC to do the job. If BC does not do its job properly, Members can kick out the BC Members. This is how it has worked before and how it will work in the future. As rightly pointed out by Ira Biswas, the proposed amendment does not rescue the motion because of the perception that BC has not done anything. In light of the circumstances of the case, Razlan Hadri asked the proposers to consider withdrawing their motion and letting BC do what it is supposed to do. Noting that there are a few more speakers who have lined up to speak.

**[62]** Given the fact that the Malaysian Bar knew exactly what the correct procedure was in dealing with complaints of misconduct by its members, it does not speak well of its action in the present case in allowing the motion to be

tabled and decided at the AGM instead of referring it to the Disciplinary Board for the Board's action. It must have been difficult for Dato' Ambiga Sreenevasan to argue before us that the motion moved by Tommy Thomas and Tan Sri VC George to condemn the appellant 'in the strongest terms' from the floor of the House is not ultra vires the LPA when it was in clear breach of s 99(1).

REMEDY FOR BREACH OF STATUTORY DUTY

**[63]** There is no express provision in the LPA to provide for any remedy for breaches of its provisions. The appellant's contention is that this is because the LPA was never meant to be utilised and abused the way it was done in this case. The appellant relies on the following common law authorities to support his contention that the breach of statute by the respondents entitles him to a remedy:

(a) *Cutler v Wandsworth Stadium Ltd* [1949] AC 398:

> For instance, if a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach. For, if it were not so, the statute would be but a pious aspiration.

(b) *Butler (or Black) v Fife Coal Co Ltd* [1912] AC 149; 1912 SC (HL) 33:

> If the duty be established, I do not think there is any serious question as to the civil liability. There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute.

(c) *Monk v Warbey and others* [1935] 1 KB 75:

> In *Phillips v Britannia Hygienic Laundry Co (1)* Banks LJ pointed out that where a person has been injured by the breach of a statutory obligation and the statute has not in express terms given a remedy, the remedy which by law is properly applicable to the obligation follows as an incident; but where a specific remedy is given by the statute that remedy can alone be followed ...
>
> One question to be considered is, does the Act contain reference to a remedy for breach of it? Prima facie if it does that is the remedy. But that is not conclusive.
>
> The intention as disclosed by its scope and wording must still be regarded, and it may still be that, though the statute creates the duty and provides a penalty, the duty is owed to individuals.

**[64]** These are no doubt very old cases two of which predate the second World War but in our view they are still relevant and applicable by virtue of s 3(1) of the Civil Law Act 1956 which is reproduced below for ease of reference:

A (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall —

(a) in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956;

B

(b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951;

C (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 12 December 1949, subject however to subparagraph (3)(ii):

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local

D circumstances render necessary.

**[65]** We are not aware if these cases have been overruled by any later decision of the English apex court, nor are we aware of any decision of this court that

E decided differently. Regardless, we are of the view that on a true construction of s 99(1) read with s 94(1) of the LPA, the appellant comes within the class of persons intended to be protected by Parliament to have a private remedy: See *Cutler v Wandsworth Stadium Ltd* which was followed by the House of Lords in *Pickering v Liverpool Daily Post and Echo Newspapers plc and others* [1991] 1 All

F ER 622 where Lord Bridge of Harwich said at p 632:

> In the well-known passage in the speech of Lord Simonds in *Cutler v Wandsworth Stadium Ltd (in liq)* [1949] 1 All ER 544 at 547–548; [1949] AC 398 at 407–409, in which he discusses the problem of determining whether a statutory obligation imposed on A should be construed as giving a right of action to B, the whole

G discussion proceeds upon the premise that B will be damnified by A's breach of the obligation.

**[66]** In a fairly recent decision of the UK Supreme Court in *Campbell v Gordon* [2016] UKSC 38, it was held as follows. The general rule was that a

H person did not have a civil right of action in respect of another's failure to comply with a statutory obligation where the statute imposed a criminal penalty for that failure to comply; that in so far as, by way of exception to the rule, civil liability could arise where the statutory obligation had been imposed

I for the benefit or protection of a particular class of individuals.

**[67]** In the case before us, the LPA does not provide for a criminal penalty for non compliance with the mandatory requirements of s 99(1). That in our view makes for a stronger case for civil liability to arise for its breach.

**[68]** The statutory obligation imposed on the Bar by s 99(1) of the LPA was for it to refer the complaint of misconduct by the appellant to the Disciplinary Board. It had breached that statutory obligation and as a result the appellant had been damnified. It was a direct consequence of the breach that the allegation of misconduct by the appellant with all its intended defamatory meaning had been disseminated to no less than 15,000 members of the Bar, other than being disclosed to the media even before a complaint under s 99(1) of the LPA was lodged with the Disciplinary Board. This would not have happened if the Bar had complied with s 99(1) by referring the complaint to the Disciplinary Board 'in the first place' after receiving the motion from Tommy Thomas and Tan Sri VC George.

**[69]** There is force to the appellant's argument that due to the way in which the complaint of misconduct against him had been mishandled by the Malaysian Bar, he had been seriously prejudiced and disadvantaged in his defence to the complaint which the Bar subsequently lodged with the Disciplinary Board pursuant to the motion submitted by Tommy Thomas and Tan Sri VC George under s 64(6) of the LPA, and which the Bar then wrongfully acted on by uploading it on the Bar's website and slating it for debate at the upcoming AGM.

**[70]** The question is whether the appellant is entitled to a remedy arising from such breach of statutory duty by the Malaysian Bar. On the authorities referred to above, in particular *Monk v Warbey*, the remedy is available as 'the remedy follows as an incident'. It is true that in the end the motion was not discussed due to the injunction obtained by the appellant but the fact remains that the damage had been done. The allegation of misconduct in all its details had already been made, disseminated and accepted by the Malaysian Bar for resolution at the upcoming 69th AGM, sending out a clear and unmistakeable message that the appellant had indeed been guilty of misconduct since 10 February 2015 and must therefore be condemned 'in the strongest terms'. We therefore reject the Malaysian Bar's contention that no damage had been established by the appellant for the Bar's breach of s 99(1) of the LPA.

THE ACADEMIC POINT

**[71]** Last but not least is the question of whether this appeal should be dismissed *in limine* for being academic on the ground that it was founded on a motion that was 'not tabled' at the AGM and on the further ground that the complaint of misconduct by the appellant had been referred to the Disciplinary Board by the Malaysian Bar. In other words, the respondents' contention was that the substratum of the appellant's cause of action no longer exists.

**[72]** The issue does not appear to have been raised by the parties in the Court of Appeal where the determinative issues, as mentioned in para [22] of the judgment, were confined to the following:

(i) Whether the 4th Respondent was rightly joined and sued?

(ii) Whether the 1st to 4th Respondents are entitled to the defence of justification, qualified privilege and fair comment?

(iii) Whether the 1st to 4th Respondents have committed the tort of conspiracy to defame/injure?

(iv) Whether the 1st and 2nd Respondents have breached their statutory duties by presenting the motion?

(v) Whether the 3rd and 4th Respondents have breached their statutory duties by accepting the motion?

**[73]** Be that as it may, the appellant's answer to the contention was that his case is supported by the decision of the English court in *Gibson v Union of Shop Distributive and Allied Workers* [1968] 2 All ER 252 where at p 254 the court said:

> I have been referred to a number of authorities but I do not think that it is necessary for me to go through them, for the problem turns on the question how the court ought to exercise its discretionary power of granting declaratory relief. I can easily understand why, if a plaintiff starts an action seeking declaratory relief in respect of some question of such kind that *no legal results will flow from the declaration which he seeks*, the court will be disinclined to entertain his action and to grant any relief in it; and I can understand that the action would be dismissed as being one which it would serve no useful purpose to try. If, however, when the action is instituted the plaintiff has or may have a good ground of complaint, *not of an academic character but involving substantial legal issues*, it seems hard that, when the case comes on for trial, he should be faced with the suggestion that it ought not to be tried because by then the relief which he seeks has become much less important or has ceased to have practical implications, owing to the lapse of time between the date when he issued the writ and the time when, having regard to the business of the court and the necessary preparatory steps, the action comes on for trial ... Moreover, the powers that are here said to have been improperly exercised by the defendant union are disciplinary powers and the question whether they were rightly or wrongly decided, I think, may well have repercussions which are not in the nature of legal results flowing from that disciplinary action but are repercussions which might affect the plaintiff in his union in the future; if for instance he desires to seek office in the future in the union. (Emphasis added.)

**[74]** Applying the principle to the facts of the present case, the question is whether the declaratory relief that the appellant was seeking for was in respect of 'some question of such kind that no legal results will flow'. In our view, the answer to the question has to be in the negative in that the declaratory relief

that the appellant was seeking for has a significant bearing on the disciplinary proceedings that he is now facing before the Disciplinary Board.

**[75]** This is not a case where the appellant's complaint is of a character that serves no useful purpose if the declaratory relief that he sought for is granted. The fact is, the appellant is now facing the prospect of being disciplined by the Disciplinary Board with all the attendant consequences despite the gross violation of the law by the Malaysian Bar. There has to be consequences for the Bar's breach of s 99(1) of the LPA, and it will not be wrong to say that the Malaysian Bar along with Tommy Thomas and Tan Sri VC George will be coming to the Disciplinary Board with unclean hands.

**[76]** We therefore find no merit in the respondents' contention that the appellant's action has become academic on the ground that the motion was 'not tabled' at the AGM and that the complaint of misconduct by the appellant had been referred to the Disciplinary Board. Given the circumstances, it is perfectly legitimate for the appellant to ask for a declaration that the Malaysian Bar, other than the fourth respondent whom we have decided at the commencement of the hearing should not be made a party to the action, had breached its statutory duty under s 99(1) of the LPA, thereby damnifying him and prejudicing his case before the Disciplinary Board.

**[77]** For completeness and before we conclude, we need to touch very briefly on the appellant's claim against the respondents for the tort of defamation which was dismissed by the High Court and affirmed by the Court of Appeal on the ground that the respondents had succeeded in establishing the defence of justification. What this means is that the defamatory nature of the words were proved by the appellant except that the claim could not be sustained as the respondents were protected by the defence of justification. Nothing beyond that must be read into the decision.

**[78]** The point to appreciate is that the decision must not be taken as proof that the appellant had as a matter of fact misconducted himself as alleged in the complaint lodged by the Malaysian Bar with the Disciplinary Board pursuant to the motion submitted by Tommy Thomas and Tan Sri VC George. The defamation action is separate and distinct from the complaint of misconduct against the appellant. More importantly, it is not for the court to find the appellant guilty or not guilty of misconduct within the meaning of s 99(1) of the LPA. That is entirely a matter for the Disciplinary Board to determine in the ongoing disciplinary proceedings against the appellant.

**[79]** For all the reasons aforesaid, our answers to the questions of law posed are as follows:

(a) question 1(a) — negative;

(b) question 1(b)(i) — affirmative;

(c) question 1(b)(ii) — negative, as this is a matter which the appellant could take up should he be dissatisfied with the decision of the Disciplinary Board that is adverse to him;

(d) question 1(c) — affirmative;

(e) question 1(d) — affirmative; and

(f) question 1(e) — affirmative.

**[80]** In the circumstances, the appeal is allowed with no order as to costs. The decision of the Court of Appeal is set aside and the appellant's claim is allowed in terms of the prayers reproduced in para 8 of this judgment. The case is reverted to the High Court for assessment of damages against the Malaysian Bar (third respondent) by a High Court judge. We are not making the same order against Tommy Thomas (first respondent) and Tan Sri VC George (second respondent) as unlike the Malaysian Bar, they are not statutory bodies to be bound by s 99(1) of the LPA.

*Appeal allowed with no order as to costs; decision of Court of Appeal set aside, and appellant's action allowed; case reverted to High Court for assessment of damages against third respondent by a High Court judge*

Reported by Dzulqarnain bin Ab Fatar